The *Goss* Principle

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[What follows is a transcript of extemporaneous remarks, with no significant revision.]

My interest is in law reform. Within this broad and uncertain subject I want to see what can be done to make the law better than it is. On the subject of requirement of opportunity to be heard, I think the way to make the law better has to do with something other than the ninety-nine percent of the problems that come to court on the question whether one is entitled to a trial-type hearing. Instead, the subject that seems to me to be promising is the many, many cases that *don't* come to court, involving the question whether one is entitled to a hearing of some sort, in circumstances in which everybody is agreed that a trial-type hearing would be inappropriate. I think the question we need to focus on is what to do about the case in which there is some doubt about the facts, and the circumstances are such that a *trial* would be clearly inappropriate.

When you begin all the way back at the start of the twentieth century, and you look at the *Bi-Metallic* case[1] of 1915 and the

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1. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

Londoner case[2] of 1908, and you follow all the Supreme Court law that is related to the requirement of opportunity to be heard, you find that, until 1970, almost every case was focused on the question of trial-type hearing or not. And I think the Court has done pretty well on that subject. The general law is fairly clear that in a factual dispute about an individual party, a trial-type hearing is required *if* the interest at stake is one that is legally protected to that degree. But the problem has been, what should be legally protected? In 1970, for the first time, in the *Goldberg* case,[3] the Court began to break down the trial-type hearing into its constituent parts. A dozen elements of a trial-type hearing are listed in the *Goldberg* opinion.[4]

But the development that to me is exciting and promising for improving the quality of justice came as recently as 1975 in *Goss v. Lopez*.[5] The *Goss* case establishes a principle which, I think, is the true fundamental in this area. Two years after the *Goss* case the Court decided the *Ingraham* case[6] which rejected the *Goss* principle. But I think that is temporary. Then we have the *Horowitz* case[7] in 1978 which had opportunity to reestablish the *Goss* principle and did not do so. Whether or not the *Goss* principle is now the law is somewhat unclear. But I think the *Goss* principle (1), has a great future and (2), *should* have a great future.

Now the *Goss* principle is quite simple. It can be applied to millions or maybe billions of cases annually in our federal, state, and local governments. That is why it is so important. As applied in the *Goss* case, the principle is that before a student can be suspended for up to ten days from a public high school due process requires at least

> that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The [due process] Clause requires *at least* these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.[8]

I ought to mention that the *Goss* case cuts two ways. The question on which the Court divided five to four is what I have just stated: The student *is* entitled to that much procedural protection. But the Court was unanimous (and this is rather significant) in

2. Londoner v. Denver, 210 U.S. 373 (1908).
3. Goldberg v. Kelly, 397 U.S. 254 (1970).
4. *Id.* at 267-71.
5. 419 U.S. 565 (1975).
6. Ingraham v. Wright, 430 U.S. 651 (1977).
7. Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).
8. 419 U.S. at 581 (emphasis added).

holding that the student is *not* entitled to *more* procedural protection. The Court was unanimous that he is not entitled to confrontation, to cross-examination, to call witnesses, to be represented by counsel.[9] He is not entitled to *any* procedural due process protection except a chance to respond to a statement of the charges and a summary of the evidence against him.

Now, when I spent most of my time in the 1960s trying to study what I called "Discretionary Justice" (and a book of that title was published in 1969),[10] I was trying to move away from the ten percent of the administrative process on which the legal profession has always focused in the big subject of administrative law and to deal with the ninety percent or more that has to do with informal action. The courts use the term "formal action" for anything that is done through a trial-type proceeding and "informal action" for anything that is done without a trial-type proceeding. I found rather easily and quickly that the injustice is *almost entirely* in the *informal* area (or at least what I deem to be injustice which, of course, has a subjective element in it). I am convinced that we need to give more attention to the more than ninety percent even at the expense of giving less attention to the less than ten percent. In the book *Discretionary Justice* I said this:

> The tendency of courts, aided and abetted by practitioners, has been to refuse to recognize any middle position between requiring a trial-type hearing and not requiring it. Often a trial-type hearing is either too cumbersome or too expensive or both, and yet some procedural protection is desirable. *Often a good procedure is to let a party know the nature of the evidence against him and to listen to what he has to say*, even though, in general, no such procedure is recognized either in statutory law or in case law.[11]

In the third edition of my *Administrative Law Text*, published in 1972, I discussed this subject under the title of "Abridged Trials," and the central sentence is this one at page 169: "A mighty good quick procedure—far superior to complete absence of procedural protection—is to confront a party with a summary of the evidence against him and to listen for five minutes to what he has to say." That is what I now call the *Goss* principle.

The *Goss* principle can change procedural injustice into procedural justice in a hundred times as many instances as even the best law that has to do with whether or when a trial-type hearing

9. *See id.* at 583.
10. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).
11. *Id.* at 118-19.

is required. Let me repeat that in a second form. Millions or billions of informal decisions affecting interests of private parties are made every year by federal, state, and local governments, but usually with no protection of any kind procedurally. The *Goss* principle could be appropriately applied to a very large portion of them. Let me say it again in a third form. The legal system over a good many decades has been doing very well in providing procedural justice in dealing with the larger interests in deciding whether or not a trial-type hearing is required. But the legal system has *not* been doing well in providing procedural justice for the smaller interests. The *Goss* principle, if proliferated and widely applied, can correct a very large portion of today's procedural injustice. This time you will not be surprised if I make the same point in a fourth way. Those who agree with the idea that has been dominant in the legal profession throughout the twentieth century assume that the key question about opportunity to be heard is the right, or lack of right, to a trial-type hearing. When that attitude prevails, administrators discover in particular cases that procedure costing $10,000 cannot be used on a $1,000 case. But justice can and should be done in the $1,000 case—for the suspension of a student for a few days, or the exclusion of the schoolboy from the soccer team, or whatever, if there is a question of fact involved. That's the *Goss* principle. The *Goss* principle takes care of that and it has tremendous potential.

Now, I have stated it four ways and you ought to be convinced of the importance of the *Goss* principle, but I can say one simple thing that will multiply its importance by ten or more: The principle need not be limited to *informal adjudication*; it need not be limited to *adjudication*. It applies to all sorts of other things: prosecuting, investigating, publicizing, concealing, planning, recommending, supervising. You can all add to that list. The *Goss* principle has applicability whenever an administrator is finding facts about a particular party. Its compass is extremely broad.

So I regard the Supreme Court's creation of the *Goss* principle in 1975 as one of the most important legal developments that I have known in my lifetime. What does the Supreme Court think of it? By a five to four vote in 1977, in the *Ingraham* case involving the paddling of a high school student, the Court seemed to reject the *Goss* principle.[12] The student who was paddled was kept out of school for eleven days by his physician. The eleven-day forced absence from school is a larger interest than the "up to ten days of suspension" that was dealt with in the *Goss* case. You cannot reconcile the two cases fundamentally. Mr. Justice Stew-

12. 430 U.S. at 682 & n.55.

art was silent in both cases and he took opposite positions in the two cases for reasons that I cannot understand. The four Justices in the *Ingraham* case asserted in dissent: "There is every reason to require . . . a few minutes of 'informal give-and-take between student and disciplinarian' as a 'meaningful hedge' against the erroneous infliction of irreparable injury."[13]

In 1978, just two or three weeks ago, we had the *Horowitz* decision involving a medical student who was excluded from school for academic reasons. The Court in the *Horowitz* case, I think, had opportunity to reestablish the *Goss* principle but did not do so. All nine of the Justices were in agreement in deciding the case against the student, but five opinions were written. The opinion that I think is the choice opinion is that of Mr. Justice White, and he was alone among the nine Justices: The other eight did not concur with him. He said: "As I see it, assuming a protected interest, respondent was at the minimum entitled to be informed of the reasons for her dismissal and to an opportunity personally to state her side of the story."[14] The Rehnquist opinion for the Court was along a different line. I think the central sentence in it was this: "We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."[15] Mr. Nathanson is going to tell us all about the *Horowitz* case.[16] I'm not going to talk about it further because it is his subject.

The idea of the abridged hearing, in my opinion, as recognized by the Supreme Court in the *Goss* case, will surely survive the *Ingraham* and *Horowitz* cases. The Court's opinion in *Ingraham* not only failed to respond to the reasons in favor of the *Goss* principle, but I think the five-member majority of the Court misunderstood the *Goss* principle because this is what the Court said: "Hearings—even informal hearings—require time, personnel and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather

13. *Id.* at 695-96 (White, J., dissenting) (quoting Goss v. Lopez, 419 U.S. at 583-84).

14. 435 U.S. at 97 (White, J., concurring in part and concurring in the judgment).

15. *Id.* at 90.

16. Nathanson, *From Dr. Bonham to Ms. Horowitz: Fair Hearing in Historical Perspective*, 16 SAN DIEGO L. REV. 295 (1979).

than incur the burdens of complying with the procedural requirements."[17] That sounds to me as though they were thinking about some sort of informal trial. Those words may have been written before Mr. Justice White wrote his dissenting opinion in which he made a simple statement. With this one sentence from him, I shall conclude: "The disciplinarian need only take a few minutes to give the student 'notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.' "[18]

17. 430 U.S. at 680.
18. *Id.* at 700 (White, J., dissenting) (quoting Goss v. Lopez, 419 U.S. at 581).